Office-Supreme Court, U.S.
FILED
APR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL,
ET AL., PETITIONERS

v.

VERNON WALLACE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Barr v. *Matteo*, 360 U.S. 564 7

Bates v. *Clark*, 95 U.S. 204 9

Bell v. *Hood*, 327 U.S. 678 6

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 3

Brown v. *GSA*, 425 U.S. 920 10

Burns v. *Wilson*, 346 U.S. 137 5

Carlson v. *Green*, 446 U.S. 14 ..... 3, 4

Davis v. *Passman*, 442 U.S. 228 3

Department of the Air Force v. *Rose*, 425 U.S. 352 8

Erie R. Co. v. *Tompkins*, 304 U.S. 69 6

Feres v. *United States*, 340 U.S. 135 ..... 3, 7, 8

Gilligan v. *Morgan*, 413 U.S. 1 5

Imbler v. *Pachtman*, 424 U.S. 409 5

Jaffe v. *United States*, 663 F.2d 1226, cert. denied, 456 U.S. 972 4

Jones v. *Reagan*, 696 F.2d 551 5

Leo Sheep Co. v. *United States*, 440 U.S. 668 7

Little v. *Barreme*, 6 U.S. (2 Cranch) 170 9

Mitchell v. *Harmony*, 54 U.S. (13 How.) 113 9

Page

Cases—Continued:

Nixon v. *Fitzgerald*, No. 79-1738 (June 24, 1982) 1

Parker v. *Levy*, 417 U.S. 733 8

Rostker v. *Goldberg*, 453 U.S. 57 5

Scheuer v. *Rhodes*, 416 U.S. 232 9

Sellers v. *Procunier*, 641 F.2d 1295 7

Taylor v. *Jones*, 653 F.2d 1193 5

United States v. *Muniz*, 374 U.S. 150 7

United States ex rel. Toth v. *Quarles*, 350 U.S. 11 8

Wheeldin v. *Wheeler*, 373 U.S. 647 6

Wilkes v. *Dinsman*, 48 U.S. (7 How.) 89, on writ of error after a new trial, 53 U.S. (12 How.) 389 6

Wright v. *White*, 166 Or. 136, 110 P.2d 948 7

Constitution and statutes:

U.S. Const. Amend. VIII 6

28 U.S.C. 1331 3

28 U.S.C. 1343(a)(1) 3

42 U.S.C. 1985(3) 3

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e-16 10

Miscellaneous:

M. Binkin and M. Eitelberg, *Blacks and the Military* (The Brookings Institution 1982) 9

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-167

COMMANDER GEORGE C. CHAPPELL, ET AL., PETITIONERS

v.

VERNON WALLACE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The issue in this case is whether the Court should create one "particular private remedy" for servicemen (*Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 25) — a personal damages action against a superior officer in his individual capacity — when Congress has not affirmatively authorized such relief. Contrary to some of the more extravagant assertions of respondents and the amici, we of course do not suggest that the military "should be removed from the realm of the constitutional process" (LDF Am. Br. 16)[1] or "place[d] * * * above the constitutional law of the

---

[1] "LDF Am. Br." refers to the brief of amicus curiae NAACP Legal Defense & Educational Fund, Inc., and "ACLU Am. Br." refers to the brief of amicus curiae American Civil Liberties Union. "LC Am. Br." refers to the brief of amicus curiae Lawyers' Committee for Civil Rights under Law.

land" (ACLU Am. Br. 30). See also Resp. Br. 18, 20 n.27, 35-36, 43-44; LDF Am. Br. 12, 15, 24, 38, 56. Racial discrimination of any form in the military is obviously intolerable.

This case, however, does not concern the substantive constitutional rights of servicemen. Nor does it concern a wide range of remedies available to servicemen. We dedcribed these remedies in our opening brief, where we noted that allegedly unconstitutional conduct by a military commander can be reviewed in court in a proper action for declaratory or injunctive relief. See Pet. Br. 32-35. Accordingly, the repeated assertions of respondents and amici that we would leave servicemen with "no federal remedies against discrimination" (Resp. Br. 10; see *id.* at 21 n.28; ACLU Am. Br. 4, 17) are also plainly incorrect.[2] This case concerns only a single remedy that is particularly inconsistent with military discipline, particularly likely to disrupt the command relationship between servicemen and their superior officers, and particularly likely to give rise to insubstantial claims — lawsuits by servicemen seeking what, in most cases, would be ruinous money judgments.

1. Respondents do not deny that it is for Congress, not the courts, to decide in the first instance what remedies will be provided for constitutional violations. Respondents also acknowledge (*e.g.*, Resp. Br. 28) that the sole source for the constitutional remedy they seek here is a grant of general

---

[2]Indeed, respondents frequently group together all possible remedies (*e.g.*, Resp. Br. 26, 44), as if all must be either allowed or disallowed; they suggest, for example, that we would preclude servicemen from "bringing an action to enforce [their] constitutional rights" (*id.* at 36). As we explained in our opening brief, different remedies involve different considerations, and many are entirely acceptable in the military context.

jurisdiction.[3] Every time this Court has created a personal damages remedy for a constitutional violation, it has specifically noted that such a remedy will *not* be created if there are "special factors counselling hesitation in the absence of affirmative action by Congress" (*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); see *Carlson* v. *Green*, 446 U.S. 14, 18 (1980); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979)). In our opening brief, we explained that in the military context, the Court has always been reluctant to create any sort of remedy in the absence of clear congressional authorization. Pet. Br. 15-20. A fortiori, the Court should hesitate before creating a personal damages remedy that plainly has the serious potential to undermine military discipline and the military's vital command relationships.[4]

---

[3]Respondents also based their claim on 42 U.S.C. 1985(3). But Section 1985(3) is not a remedy specifically designed for military claims; indeed, as we noted in our opening brief (Pet. Br. 38 n.8), it may not even apply to federal officials at all. Moreover, as even the court of appeals recognized, if the special factors present in the military context preclude an implied constitutional damages action, they also preclude a damages action under Section 1985(3). See Pet. App. 8a-9a n.5; Pet Br. 38 n.8.

Respondents are correct in saying (Resp. Br. 45) that we do not contest the district court's jurisdiction over a Section 1985(3) claim. See 28 U.S.C. 1331, 1343(a)(1). We have, of course, consistently denied that respondents can state a claim under Section 1985(3).

[4]Amicus curiae ACLU (but not respondent) asserts (Am. Br. 9-10 n.5) that we did not raise this argument in the court of appeals. This assertion is incorrect. Our brief in the court of appeals was clear in arguing that servicemen have no implied personal damages remedy against their superior officers for a constitutional violation. For example, we relied on the analogy to *Feres* v. *United States*, 340 U.S. 135 (1950), in urging that "not all causes of action available to private citizens are available to servicemen" (Br. 11), and that because of the disruption that results from litigation in the military context, a constitutional claim against individual military officers should not be allowed (Br. 12). We also supported this argument by identifying the alternative remedies available (Br. 15). Our petition for rehearing refined our

Although the relationship between the courts and Congress is therefore at the heart of this case, the briefs of respondents and amici barely discuss the respective roles of Congress and the courts in deciding how servicemen shall be permitted to call their superior officers to account. Instead, respondents and amici invite the Court to create a remedy by "strik[ing] a fair balance" (LC Am. Br. 4) among such matters as the "heroic" as opposed to the "managerial" approach to military discipline (*e.g.*, Resp. Br. 29-32); the prevalence of racial discrimination in the armed forces; the relative risks of disaffection among servicemen who cannot sue their superiors for damages and disruption of discipline if they can (*e.g.*, Resp. Br. 32-35; LDF Am. Br. 38-40); the willingness of the military to police itself, and the efficacy of the remedies provided by Congress; and the extent to which military life has come to resemble civilian life. These are plainly judgments that Congress is better suited to make. In addition, if this Court were to create an implied damages remedy, lower courts and juries, in deciding particular cases, would again have to balance the needs of discipline against the claims of servicemen — for example, in considering the four factors enumerated by the court of appeals, in deciding whether an officer is entitled to qualified immunity, and in assessing damages. Their decisions would undeniably have a profound effect on the willingness of superior officers to issue orders that stir resentment or place servicemen in jeopardy. But "the rights of men in the armed

---

argument further and presented it in terms similar to those we use here, relying, for example (Pet. for Reh. 7-8) on the discussion of "special factors" in *Carlson* v. *Green* — a case that had not been decided when our court of appeals brief was filed — and the Third Circuit's decision in *Jaffee* v. *United States*, 663 F.2d 1226 (1981) (en banc), cert. denied, 456 U.S. 972 (1982).

The ACLU is also incorrect in saying that this is a jurisdictional issue. See, *e.g.*, *Carlson* v. *Green*, *supra*, 446 U.S. at 17 n.2.

forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are *not* the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion; emphasis added; footnote omitted). See also *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

Respondents and amici attempt to argue that by not explicitly exempting military officers from personal damages suits, Congress has expressed a judgment that such suits should be permitted. *E.g.*, LDF Am. Br. 26-27. But this Court has repeatedly created immunities in the absence of explicit congressional authorization, even when Congress explicitly provided the cause of action — as, of course, it has not here. See *Imbler* v. *Pachtman*, 424 U.S. 409, 417-419 (1976). Moreover, as we explained in our opening brief, with the exception of the court of appeals' decision in this case and a single district court decision that is on appeal, we know of no court that has permitted a serviceman to sue his superior officer for damages in modern times. See Pet. Br. 14-15. This trend has continued since we filed our opening brief. *Jones* v. *Reagan*, 696 F.2d 551 (7th Cir. 1983). See *id.* at 555 ("This does not mean that the military is 'above the Constitution.' It just means that in the circumstances of this case these plaintiffs have no damages remedy in federal court against their military superiors.").[5] Although respondents quarrel with us over the facts of

---

[5]Respondents repeatedly cite *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981), which they describe as "one of the most important decisions" in this area (Resp. Br. 26; see *id.* at 7, 22). But *Taylor* was a suit against the head of a state national guard, who was appointed by the governor of the state, and the court specifically noted that the plaintiff "has not sought to impose individual and personal liability on [the defendant] for the deprivation of federal rights" (653 F.2d at 1205).

some of the lower court decisions we cite, incorrectly suggesting (*e.g.*, Resp. Br. 23-24 n.31) that they all involved only allegations of negligence, respondents and amici are unable to cite any modern decision that has permitted a damages action by a serviceman against his superior officer. In these circumstances, Congress's failure to enact legislation precluding such suits scarcely amounts to an endorsement of them.

At the same time, there is no reason to doubt that Congress has been well aware of allegations of racial discrimination and other unconstitutional action by military officers. And Congress has provided remedies, which we detail in our opening brief. But these remedies, which permit judicial review without undermining military discipline, do not include a personal damages action by servicemen against their superiors. See also page 10, *infra*.

For these reasons, *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), on writ of error after a new trial, 53 U.S. (12 How.) 389 (1851), on which respondents and amici rely so heavily, is, as we explained (Pet. Br. 39-40), of little help to them. *Wilkes* involved a common law claim.[6] It was decided at a time when federal courts were thought to have general common law powers in many areas. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963) ("As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U.S. 69 [1938]."). Consequently, the principal issue in this case — whether the

---

[6]Contrary to amicus curiae LDF (Am. Br. 36, 46), *Wilkes* was not based in any part on the the Eighth Amendment, of which the opinions make no mention. If *Wilkes* had been based on the Constitution, it would have resolved the question left open by *Bell* v. *Hood*, 327 U.S. 678 (1946), and answered by *Bivens*.

Court should create an implied damages action for servicemen against their superiors in the absence of affirmative congressional authorization — simply was not presented in *Wilkes*.[7]

2. Respondents and several of the amici assert that the military is no different from many civilian organizations —in particular, prisons — for purposes of creating an implied damages remedy. See, *e.g.*, Resp. Br. 29-32; LDF Am. Br. 49 n.35; ACLU Am. Br. 47; LC Am. Br. 13, 20-22. The suggestion that servicemen must be allowed to bring personal damages actions because prisoners can is foreclosed by *United States* v. *Muniz*, 374 U.S. 150 (1963), which held that prisoners may sue under the Federal Tort Claims Act; *Muniz* distinguished *Feres* v. *United States*, 340 U.S. 135 (1950), which held that servicemen may not

---

[7]There is also reason to believe that *Wilkes* was inconsistent with the prevailing common law view. See, *e.g.*, *Barr* v. *Matteo*, 360 U.S. 564, 580-581 (1959) (Warren, C.J., dissenting); *Wright* v. *White*, 166 Or. 136, 148, 110 P.2d 948, 952-953 (1941) (absolute immunity for military commanders sued in tort by subordinates "has been incorporated into the common law of this country"). See also Pet. Br. 22, 27.

In addition, respondents do not explain why the Court should ignore the fact that *Wilkes* was decided at a time when the military lacked comprehensive internal remedial mechanisms and litigation posed less of a threat. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687 (1979) ("[P]resent times are litigious ones."). See also *Sellars* v. *Procunier*, 641 F.2d 1295, 1300 n.8 (9th Cir. 1981):

> In 1869, Chief Justice Cockburn flailed the doctrine of judicial immunity in his dissent in *Dawkins* v. *Lord Paulet*, L.R.S.Q.B. 94 (1869). He wrote: "I am persuaded that the number of such actions [against judges] would be infinitely small and would be easily disposed of." *Id.* at 110. While the Chief Justice's argument may have had force in 1869, we do not believe it would be realistic in today's litigious era to discount the enormous burden and systemic costs that permitting civil rights suits against judges would impose on both the judge sued and on the federal courts themselves.

bring FTCA actions, principally on the ground that military discipline and prison discipline have entirely different requirements. See 374 U.S. at 162-163.

In any event, the comparison between prisons and the military is misconceived. Both the government's institutional interests and political pressures ensure that the government will pay careful attention to the well-being of its servicemen. More important, military discipline is not simply a matter of imposing order and preventing disruption. Rather, it involves "ingrain[ing] * * * reflexes" (*Department of the Air Force* v. *Rose*, 425 U.S. 352, 368 (1976)) and developing the relationships of loyalty and command that prepare people for the unique situation of combat. As we explained in our opening brief, military discipline in this sense is incompatible with the attitudes and habits of thought fostered by the availability of civil damages litigation — in which every serviceman can look on an officer whose orders aggrieve him as a potential defendant, able to be haled into court and threatened with prolonged litigation and massive liability.

It is also an error to believe that because some of the tasks performed by some members of the military resemble civilian tasks, the needs of military discipline and preparedness can be neglected. As this Court has repeatedly emphasized, "[t]he differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " *Parker* v. *Levy*, 417 U.S. 733, 743 (1974), quoting *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). This vital difference has, of course, survived any changes in technology or in theories of management, and it exists as clearly today as it has throughout history.

3. Respondents and amici, citing cases in which civilians were permitted to sue military officers (*e.g.*, *Bates* v. *Clark*, 95 U.S. 204 (1877); *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1852); *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804); cf. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)), assert that we are attempting to make officers absolutely immune from all suits growing out of their official duties. See, *e.g.*, ACLU Am. Br. 48-51. As we made entirely clear in our opening brief, however, our concern here is only with *servicemen's* suits against their superiors. See, *e.g.*, Pet. Br. 35-37. We do not contend that military officials are absolutely immune from all suits related to official duties, whether brought by servicemen or civilians. But, as we explained in our opening brief (Pet. Br. 36-37), the policies that, under this Court's decisions, will justify an absolute immunity plainly do require that superior officers be held absolutely immune from servicemen's suits for damages, in the absence of clear congressional authorization.

4. Finally, respondents and amici discuss in much detail the history of racial discrimination by the armed forces. *E.g.*, Resp. Br. 12-17, 42-43; LDF Am. Br. 4-12. It is, of course, fortuitous that the constitutional claim in this case is one of racial discrimination. The court of appeals did not purport to limit its ruling to such claims, and analytically it could not have done so. Our concern is not simply with race discrimination suits; the court of appeals has authorized personal damages actions by servicemen against superior officers for a wide variety of alleged constitutional violations. Moreover, the discussions of respondents and amici on race discrimination are principally historical, not contemporary, and it is simply incorrect to assert that the military is rife with discrimination today.[8] Nonetheless, we

---

[8]See, *e.g.*, M. Binkin and M. Eitelberg, *Blacks and the Military* 11 (The Brookings Institution 1982) ("Today the U.S. military establishment stands in sharp and favorable contrast with other institutions in American society in making headway against racism.").

offer three observations on the problem of racial discrimination in the military and its relevance to this case.

First, if Congress believed that a damages action was the best means of extirpating racial discrimination in the military, it would almost certainly have enacted such a remedy. In 1972, Congress, explicitly concerned about racial discrimination against civilian federal employees, extended Title VII of the Civil Rights Act of 1964 to them. See 42 U.S.C. 2000e-16. Congress also made a Title VII suit — which is brought against the government, not against an individual official — the exclusive remedy for federal civilian employees alleging racial discrimination. See *Brown* v. *GSA*, 425 U.S. 820 (1976). Congress excluded servicemen from the Title VII remedy. See Pet. Br. 38 n.8.

Under no plausible view of congressional intent can it be argued that Congress meant to allow civilian employees to sue only the government for racial discrimination while leaving servicemen free to bring vastly more disruptive (and less efficacious; see pages 10-11, *infra*) suits against individual officers. Nor is it likely that Congress, while carefully designing elaborate remedies for discrimination against civilians, simply overlooked what respondents describe as the notorious problems of racial discrimination in the military. The most plausible inference is that Congress believed that the remedies it expressly designed for the military, when combined with the military's extensive efforts to police itself, were the appropriate remedial approach in the military context.

Second, respondents and amici repeatedly speak of entrenched and systemic racial discrimination. See, *e.g.*, Resp. Br. 42-43; LDF Am. Br. 12. By this they apparently mean that discrimination in the armed forces is the result not of the aberrant acts of individuals but of practices not traceable to any identifiable individual decision. But to the

extent this is true, individual damages actions are necessarily a poor way of attacking the problem.[9] The threat of such an action is likely to have a chilling effect on a commanding officer who is considering whether to give an order that will be resented, but imposing liability on a few individuals will not make much headway against discrimination of the form described by respondents and amici. Systematic approaches, such as the Navy's Equal Employment Opportunity regulations, are far more promising.

Finally, we fully agree with respondents and amici that racial discrimination in the armed forces can seriously damage morale. Congress, undoubtedly, is aware of this fact as well. But this is not an argument for a judicially created remedy. On the contrary, in view of the strong institutional interest that Congress and the military itself have in rooting out discrimination, Congress's demonstrated capacity and willingness to devise remedies for racial discrimination in public employment, the Navy's comprehensive internal mechanisms for combating racial discrimination, the progress already made against race discrimination in the military, the relative ineffectiveness of the personal damages remedy respondents propose, and the serious costs that such a remedy would have in the military context, it is entirely clear that the Court should not supplement the existing remedial scheme by creating a personal damages remedy in the absence of affirmative action by Congress.

---

[9]For example, some of the discriminatory acts alleged by respondent Wallace (see Resp. Br. 3; J.A. 27) are attributed not to petitioners but, apparently, to anonymous enlisted servicemen.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1983

DOJ-1983-04

[THIS PAGE INTENTIONALLY LEFT BLANK]